

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SILVIA RUIZ,)	
)	
Claimant,)	IC 2003-011302
v.)	
)	
J.R. SIMPLOT COMPANY,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Employer,)	AND RECOMMENDATION
Self-Insured,)	
Defendant.)	FILED NOV 21 2007
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Twin Falls on May 31, 2007. Mark R. Wasden represented Claimant. Wes Scrivner represented Defendant. The parties presented oral and documentary evidence. They took post-hearing depositions and submitted post-hearing briefs. The case came under advisement on August 8, 2007. It is now ready for decision.

ISSUES

As modified and agreed upon by the parties at hearing, the issues to be resolved are as follows:

1. To what extent Claimant has sustained disability in excess of impairment; and
2. Whether the Commission should retain jurisdiction beyond the statute of limitations.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained a significant injury to her left upper extremity

while in the course of her employment on September 16, 2003. Both parties obtained expert opinions addressing Claimant's permanent disability and the experts respectfully disagree. Claimant contends that her disability in excess of impairment is 72.5% and Defendant contends that it is 51%. Additionally, Claimant requests that the Commission retain jurisdiction beyond the statute of limitations due to the probable need for ongoing medical treatment. Both parties have done an excellent job narrowing the issues in dispute and presenting concise argument.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant;
2. Claimant's Exhibits 1 - 22;
3. Defendant's Exhibits 1 - 2; and
4. Post-hearing depositions of orthopedic hand surgeon Douglas Hutchinson, M.D., and vocational experts Barbara K. Nelson, M.S., CRC, and Nancy Collins, Ph.D.

All objections raised in the depositions are overruled, except that objections to the exhibits to Ms. Nelson's deposition are sustained. After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

The Accident

1. Claimant began working for Employer in November 1990. On September 16, 2003, she suffered an industrial accident to her right upper extremity. Claimant was working as a blancher operator when her left hand became caught in a pinch roller which pulled her left arm forward, resulting in a near amputation at her left forearm.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

Medical Care and Physical Restrictions

2. Immediate emergency medical care was sought. Claimant was diagnosed with multiple fractures in the left forearm and has experienced loss of extensor tendons and musculature in the left arm. Since the injury, Claimant has undergone 10 surgeries to her left upper extremity, with the most recent surgery occurring on October 31, 2006. Claimant has a fused radius and ulnar bone with motor and sensory radial nerve palsy. Claimant has treated with Dr. Hutchinson since December 2004.

3. Claimant became medically stable in December 2005 at which time she was assessed a 26% permanent partial impairment rating (PPI) by Dr. Hutchinson. He explained that there were multiple possible ways to calculate Claimant's impairment rating. He opted to focus on deficits associated with radial nerve palsy as opposed to individual muscles and/or specific loss of range of motion in the fingers. He acknowledges significant scarring, but did not assign permanent impairment attributable to the scarring.

4. Claimant is not able to move her left fingers, thumb or wrist in an upward, extension manner. Claimant will never be able to move her left wrist to supinate or pronate the arm. Claimant is unable to type quickly or accurately with her left hand.

5. Dr. Hutchinson explained that Claimant's tendons and bones have healed past the point of needing physical restrictions to prevent re-injury. He agrees with permanent restrictions as described by the functional capacity evaluation (FCE) of May 9, 2007, which provides for full time work (40 hour per week/ 8 hours per day) in the light physical demand category with a lifting restriction of 20 pounds, using both hands.

6. Dr. Hutchinson has proposed future treatment in the form of a FCR (flexor carpi radialis tendon) transfer. The goal of the surgery would be to improve finger extension. Claimant is not currently interested in having an 11th surgery and wants to wait and see how things go without it.

Non-Medical Factors and Post-Injury Employment

7. At the time of the accident, Claimant was 34. Claimant was born in Mexico and is bilingual. Claimant has lived in Rupert, Idaho, since she was approximately 5 years old. Claimant reached the 12th grade at Minico High School but did not graduate.

8. Claimant estimates that she went to work for Employer when she was 19. She worked in various capacities at the Heyburn Plant, including cutter operator, blancher operator, and fryer operator. Claimant's only other pre-injury work experience was for Rolland Jones Potatoes (now defunct) as a potato sorter for six months.

9. At the time of injury, Claimant was earning \$12.11 per hour. Claimant's benefits with Employer included two weeks annual vacation pay, retirement benefits through a 401K, health insurance, disability insurance, and life insurance.

10. The Industrial Commission Rehabilitation Division (ICRD) initiated services for Claimant in October 2003. Claimant was encouraged to obtain a high school diploma or GED. Claimant was cooperative with her ICRD consultant but progress was slow due to ongoing surgeries and related periods of recovery. Claimant attended a job search workshop in April 2005 and increased her job search efforts in October of 2005. ICRD closed its file in March 2006 as Claimant had returned to work for at least 30 days. ICRD's labor market survey identified various potential jobs paying up to \$7 per hour for which Claimant qualified.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

11. Claimant was hired by Pizza Hut in February of 2006 as a delivery driver. Claimant earned \$6 per hour, plus tips, and 85 cents per delivery for auto expenses. Claimant resigned from the job after two months, primarily because she did not like being the only adult among teenage co-workers and the resulting disproportionate work load. Claimant was able to perform the delivery work but had difficulty holding pizza boxes with her left hand while she opened doors with her right hand and found it difficult to complete some of her dish washing duties.

12. Claimant found alternate employment in August 2006 as a maid at the Super 8 Motel in Burley, where she was working at the time of hearing. Claimant is able to abide by her 20 pound lifting restriction and utilizes assistance to rotate mattresses. Claimant earns \$6 per hour and is currently working approximately 20 hours per week.

13. Claimant does not have a GED or high school diploma. Vocational testing reflects that Claimant functions at an 8th grade level in most areas with reading and spelling skills below 5th grade level. Claimant's ability to learn is in the "dull normal" range. Claimant signed up for a GED preparation course, but the company offering the course refunded her money and declined to admit her into the program after review of requested documents. Claimant has taken two out of the five tests required to obtain a GED. She selected science and social studies since those were her strongest subjects. Claimant averaged 435 points out of 800 on the tests she completed and must average at least 450 on all five tests to obtain her GED.

14. The plant where Claimant worked at the time of her injury permanently closed on November 1, 2003. Some of Claimant's co-workers were able to obtain employment with other potato processing facilities, earning comparable wages.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 5

15. Prior to obtaining work at the Super 8 Motel, Claimant made application with approximately 150 potential employers. Claimant sought employment as a Spanish/English translator at a medical office but was unable to perform required typing. Claimant attempted to obtain a job at a convenience store but was turned down after taking a math test.

Expert Vocational Opinions

16. Barbara Nelson, M.S., CRC, evaluated Claimant at Claimant's request. She concluded that Claimant's permanent disability is no less than 72.5%. Ms. Nelson calculated an 80% loss of wage earning capacity and loss of access to the job market of at least 65%. Disability factors considered by Ms. Nelson include the lack of pre-existing physical impairment, visible disfigurement of the arm and Claimant's marginal education. She factored in the loss of a benefits package and compared Claimant's wages as a part-time hotel maid to her pre-injury wages. Ms. Nelson considered Claimant's impaired ability to engage in recreational activities previously enjoyed by Claimant, such as fishing, hunting and rock climbing.

17. Nancy Collins, Ph.D., evaluated Claimant at Defendant's request. She concluded that Claimant's permanent disability is 51%. Dr. Collins calculated 42% loss in wage earning capacity and loss of access to the job market of 60%. She based her calculations regarding wage earning capacity on Claimant's ability to perform full-time work as reflected in the medical records and did not include loss of benefits based on the assumption that Claimant will be able to obtain a job with benefits similar to those paid by Employer. Dr. Collins' rating does not include disfigurement.

DISCUSSION AND FURTHER FINDINGS

Disability In Excess of Impairment

18. Permanent disability is defined and evaluated according to statute. Idaho Code

§§ 72-423, 424, 425, 430(1). Some factors are expressly defined by statute and other unexpressed factors may be considered. Baldner v. Bennet's, 103 Idaho 458, 649 P.2d 1214 (1982). Wage earning capacity may not be the sole factor considered in determining permanent disability. Loya v. J.R. Simplot Co., 120 Idaho 62, 813 P.2d 873 (1991). Permanent disability is a question of fact, and the Commission is the ultimate decision maker regarding questions of fact. Urry v. Walker & Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989); Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975).

19. Claimant's testimony at hearing was credible. Claimant made diligent efforts to return to work and appears to be making the best of a difficult situation with regard to her injury.

20. Both vocational experts provided logical rationale for their calculations. The evidence supports a finding of disability in excess if impairment closer to 72.5% than 51%. There is insufficient evidence to establish that Claimant will be able to find a job which offers similar fringe benefits to those received by Claimant at the time of injury. Additionally, Claimant's disfigurement due to scarring, muscle loss and bone fusion is significant. However, the 72.5% rating is slightly inflated since it is based on Claimant's current part-time employment. Claimant's medical restrictions allow for full-time employment and it is more likely than not that Claimant will be able to transition into a full-time position.

21. Claimant established she suffered a permanent disability of 68%, inclusive of PPI.

Retention of Jurisdiction

22. Whether or not to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. Where a claimant's medical condition has not

stabilized or where a claimant's physical disability is progressive, it is appropriate for the Commission to retain jurisdiction. Reynolds v. Browning Ferris Industries, 113 Idaho 965, 969, 751 P.2d 113, 117 (1988). Retention of jurisdiction may also be appropriate in cases where there is a probable need for future temporary disability benefits associated with surgery. Elmore v. Floyd Smith, Jr. Trucking, 86 IWCD 100, p. 1278. A determination of retention of jurisdiction is not needed with regard to medical benefits as medical benefits are governed by Idaho Code § 72-432 and are not subject to the five-year statute of limitations.

23. Additional surgery has been proposed by Dr. Hutchinson, as described in preceding paragraph number 6. Claimant argues that the need for future surgery is likely. Additionally, Claimant asserts that she may need additional treatment to her shoulders.

24. Defendant asserts that Claimant's request for the Commission to retain jurisdiction beyond the statute of limitations is inconsistent with Claimant's previous decision to pursue a prompt resolution regarding permanent disability. Defendant maintains that the medical evidence fails to establish that Claimant's condition is expected to worsen after the expiration of the five-year statute of limitations.

25. Claimant's reluctance to undergo the proposed surgery, at this time, is understandable in light of her multiple previous surgeries. When and whether Claimant will opt to proceed with the FCR transfer is speculative. Although the goal of the additional surgery would be to improve Claimant's finger extension, there is no way to predict the extent to which Claimant's condition will be improved or worsened as a result of the procedure.

26. It is not appropriate for the Commission to retain jurisdiction beyond the statute of limitations. There is no credible evidence that the recommended FCR transfer would increase

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 8

Claimant's permanent impairment. The issue of disability in excess of impairment was appropriately litigated at hearing and such findings are intended to be final.

CONCLUSIONS OF LAW

1. Claimant suffers 68% permanent disability, inclusive of permanent impairment.
2. The Commission declines to retain jurisdiction beyond the statute of limitations.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 14TH day of November, 2007.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21ST day of NOVEMBER, 2007, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Mark R. Wasden
P.O. Box 1407
Twin Falls, ID 83303-1407

Wes L. Scrivner
P.O. Box 27
Boise, ID 83707

db

/S/ _____

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Claimant,)	IC 2003-011302
v.)	
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J.R. SIMPLOT COMPANY,)	ORDER
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Employer,)	
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Defendant.)	
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Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffers 68% permanent disability, inclusive of permanent impairment.
2. The Commission declines to retain jurisdiction beyond

the statute of limitations.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 21ST day of NOVEMBER, 2007.

INDUSTRIAL COMMISSION

/S/_____
James F. Kile, Chairman

R. D. Maynard, Commissioner

/S/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 21ST day of NOVEMBER, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Mark R. Wasden
P.O. Box 1407
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Wes L. Scrivner
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/S/_____

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